

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION SIX**

CHICORA MEDICAL CENTER, L.P.

Employer

and

Case 6-RC-11716

SERVICE EMPLOYEES INTERNATIONAL  
UNION, LOCAL 585, AFL-CIO

Petitioner

**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before Linda A. Vacca, a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to the undersigned Regional Director.<sup>1</sup>

Upon the entire record<sup>2</sup> in this case, the Regional Director finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved claims to represent certain employees of the Employer.

---

<sup>1</sup> Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by September 7, 1999.

<sup>2</sup> The Employer filed a timely brief which has been duly considered by the undersigned.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

The Petitioner seeks to represent a unit consisting of all full-time and regular part-time registered nurses employed by the Employer at its Chicora, Pennsylvania facility, excluding all certified nursing assistants, non-certified nursing assistants<sup>3</sup>, licensed practical nurses, social service aides, activities aides, housekeeping employees, laundry employees, hospitality aides, cooks, dietary aides, maintenance employees, office clerical employees and guards, other professional employees and supervisors as defined in the Act. The Employer, contrary to the Petitioner, contends that the petitioned-for unit is inappropriate in that the registered nurses are supervisors within the meaning of Section 2(11) of the Act. There are presently seven registered nurses in the petitioned-for unit.<sup>4</sup> There is no history of collective bargaining for any of the employees involved herein.<sup>5</sup>

The Employer, a limited partnership, owns and operates a 140-bed nursing and personal care facility in Chicora, Pennsylvania.<sup>6</sup> The facility consists of four nursing wings, two of which are Medicare-certified, a third wing which provides skilled nursing care, and a fourth wing which provides intermediate care. In addition, there is a 26-bed personal care unit at the facility.

---

<sup>3</sup> The unit description stated at the hearing excludes the non-certified nursing assistants, although this job classification is not mentioned in the petition as originally filed. By excluding the non-certified nursing assistants, the unit description herein is consistent with the unit description in Case 6-RC-11715, discussed in footnote 5 infra.

<sup>4</sup> The seven registered nurses in the petitioned-for unit are Cheryl Boyle, Linda Ciochetto, Ellen Goldinger, Holly Reedy, Linda Shaul, Angelica Vandevander and Rebecca Young. In addition, the Employer is in the process of hiring additional registered nurses. Further, the parties have stipulated that Rose Altimire had resigned effective August 17, 1999, and is not eligible to vote in any election directed herein. Finally, the parties have stipulated that Sylvia Miller had resigned and is not eligible to vote in any election directed herein.

<sup>5</sup> Contemporaneous with the filing of the instant petition, the Petitioner filed a petition seeking to represent the service and maintenance employees, including the licensed practical nurses, in Case 6-RC-11715. In that case, the parties have entered into a stipulated election agreement.

<sup>6</sup> The facility has been owned and operated by the current Employer since July 16, 1999.

Administrator Steven Tack is responsible for the overall day-to-day operation of the facility. Reporting to Tack is Director of Nursing (DON) Carmen McGallis. The Employer employs approximately 125 employees at the facility, including the seven Registered Nurses (RNs) at issue herein.<sup>7</sup>

The nursing department is staffed 24 hours per day, 7 days a week. DON McGallis works Monday through Friday, 7:30 a.m. to 5:00 or 5:30 p.m.<sup>8</sup> While there are variations in the daily schedules, the most recent schedule in the record reveals that on the day shift, 8 a.m. to 4 p.m., there are two to three RNs, and one to three licensed practical nurses (LPNs), as well as a number of aides. On the afternoon shift, 4 p.m. to 12 midnight, there is one RN and three LPNs or two RNs and two LPNs, five to eight aides, and one personal care aide. On the night shift, 12 midnight to 8 a.m., there is one RN and one LPN, five to six aides and one personal care aide.

On the dayshift, one of the RNs is designated as the “s” or “supervisor” RN. This RN is responsible for making rounds with the physician, for taking off the doctor’s orders<sup>9</sup>, for sending orders to the pharmacy, for advising the other nursing staff or other departments of any changes ordered by the doctor, for processing admissions and discharges, for scheduling appointments and for assessing residents and deciding whether to contact a physician. In addition, as necessary, this RN assists the other nurses with dressing changes and intravenous lines. The other RNs on the daylight shift are responsible for the two Medicare-certified units, which includes passing medications and giving treatments to residents on those units. On the afternoon and evening shift, the RNs basically provide hands-on patient care to the residents on the Medicare-certified units. Further, as discussed more fully below, on these latter shifts, the RN is the highest ranking individual on the premises, and accordingly has additional

---

<sup>7</sup> The Employer employs one graduate nurse, Kathy Thompson, whom the parties have stipulated is not eligible to vote in any election directed herein.

<sup>8</sup> Administrator Tack generally works business hours, Monday through Friday.

<sup>9</sup> These orders may include such things as dispensing specific medications, administering oxygen or sending a resident to a hospital emergency room.

responsibilities. All of the RNs at issue herein either function as the “s” nurse on day shift, or are assigned to work the afternoon or night shift.

The RNs are paid hourly and earn \$15 to \$16 per hour.<sup>10</sup> The current Employer has announced that the same benefits will be available to all employees. Wage increases are not based on merit, and according to the current Employer’s personnel policies, are given at the end of the probationary period and thereafter at scheduled intervals based upon length of service.

The scheduling of the nursing staff, including RNs, LPNs and aides, is handled by the LPN who assists the Registered Nurse Assessment Coordinator (RNAC)<sup>11</sup>. As part of the scheduling, this LPN designates which RN is to serve as the “s” nurse on the daylight shift. In addition, this LPN used to assign the aides to specific rooms and residents, but recently, because this LPN has many other duties, the RNs now assign aides to the specific rooms and residents. If an aide complains to an RN about being assigned to a particular unit, the RN can make an appropriate adjustment; LPNs can also make such modifications.

It is the Employer’s intention to have the RNs perform evaluations on the LPNs and jointly with the LPNs, to evaluate the aides.<sup>12</sup> These evaluations will be performed at the end of the first 30 days of employment and on the anniversary date thereafter. Further, the Employer intends to use the performance appraisal forms used by the former owner of this facility. These evaluations will be used solely to assess job performance and will not be the basis for any raises.

With respect to the imposition of discipline, it is the facility Administrator who decides whether to terminate or demote an employee. Further, it is the Administrator and DON who

---

<sup>10</sup> LPNs are paid \$10 to \$11 per hour; CNAs are paid \$7 to \$8 per hour and non-certified aides are paid \$6 to \$7 per hour.

<sup>11</sup> The RNAC is responsible for the development of patient care plans; the RNs at issue herein are not involved in the development of these plans. The parties have stipulated that the RNAC is not eligible to vote in any election directed herein.

<sup>12</sup> Under the former owner, evaluations were completed by the DON or Assistant DON. On infrequent occasions, the RNs were also asked to evaluate other RNs, LPNs and aides.

jointly decide whether to suspend an employee. A “pink slip”, which is an investigative report of an incident, can be prepared by an RN or an LPN.<sup>13</sup> Completion of this form requires a factual statement of the incident, the identification of witness and their statements, a report of a discussion with the employee involved as well as other investigative information. This form does not indicate that it independently constitutes discipline, nor does it solicit any recommendation of discipline. The form is forwarded to the DON, who then independently investigates the incident and takes any further action appropriate.

During the course of the shift, if the RNs become aware that employees are not performing their work properly or are otherwise engaging in inappropriate behavior, the RNs will make the employee aware of the problem and how to do the task properly or act appropriately. This type of counseling or verbal warning is not documented.

It is undisputed that on the afternoon shift, after the Administrator and DON leave for the day, and during the night shift, the RN<sup>14</sup> assigned to the shift is the highest ranking individual in the facility. The same situation occurs on weekends when upper management is not on the premises. As noted above, on these shifts, the RN is basically performing hands-on patient care duties. In addition, as part of her duties, the RN is responsible for assessing the condition of the residents, on both the units for which she is directly responsible and on the other units as well, and deciding whether it is necessary to contact a physician or family member. Only an RN is authorized to contact a physician and take an order over the telephone.

On the late afternoon and night shifts, and on the weekends, the RNs also attempt to resolve other types of issues that may arise. For example, problems may arise because aides are not assisting each other as required or an aide may not want to work on a particular unit because of a particular resident living on that unit. In one case, a concern arose as to whether

---

<sup>13</sup> For example, pink slips have been completed by RNs to report that aides have missed residents on bed checks.

<sup>14</sup> On the afternoon shift, if there are two RNs, they share this responsibility.

an aide was assisting two other aides. The RN spoke to the DON about the situation, and the DON directed the RN to resolve the situation herself. The RN then spoke to the aides and was able to resolve the matter. Further, in the event that an employee reports to work noticeably intoxicated, the RN is authorized to send the employee home.

If aides call off work at times outside of the regular workday, the calls are taken by the personal care aide, who then attempts to obtain coverage. If the personal care aide cannot obtain coverage on a voluntary basis, then the RN could mandate an aide to stay over. In a similar fashion, if an employee finds it necessary to leave work early outside of the regular workday, for a reason such as illness or a personal emergency, the request is made to the RN. The record reflects that on one occasion, on the night shift, an aide became ill and was obviously not able to perform her duties. At the time, the other staff was sufficient to cover the facility, and the RN permitted the aide to go home.<sup>15</sup>

The Administrator and DON have provided their home telephone numbers to the RNs, and the DON indicated that RNs may call her at home at any time.<sup>16</sup> The record reflects that on one occasion, outside of regular business hours, the facility was short-staffed, and an office clerical employee contacted the Administrator at home. As a result, the Administrator and DON both reported to the facility to care for the residents.

To meet the statutory definition of a supervisor, a person needs to possess only one of the specific criteria listed in Section 2(11) of the Act, or the authority to effectively recommend such action, so long as the performance of that function is not routine but requires the use of independent judgment. Nymed, Inc., d/b/a Ten Broeck Commons, 320 NLRB 806, 809 (1996).

As the Board has recently noted, the Supreme Court in NLRB v. Health Care and Retirement Corp., 511 U.S. 571 (1994) examined the application of Section 2(11) in the health

---

<sup>15</sup> Normal leave requests, such as for vacation or a personal day, are submitted to and approved by upper management.

<sup>16</sup> Since the Employer acquired this facility in mid-July, 1999, the DON has not been contacted at home by an RN.

care field. In doing so, the Court rejected the Board's "patient care analysis" for determining the supervisory status of charge nurses and found that the Board's use of the phrase "in the interest of the employer" was "inconsistent with both the statutory language and this Court's precedents." Vencor Hospital-Los Angeles, 328 NLRB No. 167, slip op. at 3 (August 5, 1999).

The Board in Providence Hospital, 320 NLRB 717 (1996), and Ten Broeck Commons, supra, analyzed the supervisory status of health care employees and found in both instances that the disputed nurses were not statutory supervisors. In these cases, the Board decided that it would henceforth analyze the supervisory status of nurses under the Board's traditional test, whether the nurses in question possess any Section 2(11) authority and whether the performance of that authority requires the exercise of independent judgment. Under that test, the burden of proving supervisory status rests with the party asserting that status. Youville Health Care Center, Inc., 327 NLRB No. 52, slip op. at 2 (1998); Bennett Industries, 313 NLRB 1363 (1994). Moreover, in applying this test, the Board is cautious in finding supervisory status because supervisors are excluded from the protections of the Act. See Vencor Hospital, supra, slip op. at 3.

In the instant case, there is no evidence nor is it contended by the Employer that the RNs have the authority to hire, suspend, layoff, recall, promote, discharge or reward employees, or to effectively recommend such action. The areas of authority the Employer relies upon to establish the RNs' supervisory status will be discussed below.<sup>17</sup>

With respect to the RNs' completion of annual performance evaluations, it is well-established that the ability to evaluate employees, without more, is insufficient to establish supervisory status. Vencor Hospital, supra, slip op. at 4; Passavant Health Center, 284 NLRB 887, 891 (1987). This factor has been deemed unpersuasive in the absence of evidence that

---

<sup>17</sup> At the outset, I note that it is well-established that it is the possession of supervisory authority which determines supervisory status, as opposed to the grant of authority, which in practice is illusory because it is never exercised. Eventide South, 239 NLRB 287 fn. 3 (1987); Pine Manor, Inc. d/b/a Pine Manor Nursing Home, 238 NLRB 1654, 1655 (1978). Thus, the job descriptions of the RNs are of significance only to the extent that they reflect the actual duties and responsibilities of the RNs.

an employee's job status was affected by such an evaluation. Manor West, Inc., 313 NLRB 956, 959 (1994). In the instant case, the record affirmatively establishes that the evaluations will be used solely to assess job performance and will not be the basis of any wage increase. Further, there is no evidence that a poor evaluation will result in any discipline or other adverse employment action.

The involvement of the RNs in disciplinary matters does not render them supervisors within the meaning of Section 2(11) of the Act. The record evidence in this case clearly indicates that the RNs do not discipline other employees nor do they effectively recommend disciplinary action. The role of the RNs is merely to discuss incidents of unacceptable behavior or work performance with the employee. If the matter is not resolved, the RNs make anecdotal reports of the incident to the DON. These reports do not constitute discipline and in the reports, the RNs make no recommendations as to discipline. Thereafter, the DON independently investigates the incident reported. Further, the LPNs, who are within a stipulated bargaining unit, also complete such anecdotal reports. The Board has consistently held that reports of unacceptable behavior or work performance which do not result in any personnel action, or if they do, where such action is not taken without independent investigation by others, as is the case herein, is not sufficient to confer supervisory status. Vencor Hospital, supra, slip op. at 4; Illinois Veterans Home at Anna L.P., 323 NLRB 890 (1997); Ten Broeck Commons, supra at 812.

With respect to the authority to send employees home for flagrant misconduct, the Board has found that when charge nurses have the authority to send employees home for flagrant violations such as drunkenness or abuse of patients, this is not an indication of supervisory authority because no independent judgment is involved; the offenses are obvious violations of the employer's policies and speak for themselves. Vencor Hospital, supra, slip op. at 4; Beverly Enterprises-Ohio d/b/a Northcrest Nursing Home, 313 NLRB 491, 498 (1993); Manor West, Inc., supra at 959.



Further, when the RNs discuss problems with the aides, such as the need to provide assistance to each other, or a desire not to work in a particular area, the RNs are not, under established Board law, exercising supervisory authority. Thus, Board law holds that such limited involvement in the dispute resolution process does not constitute the adjustment of grievances within the meaning of the Act. Illinois Veterans Home, supra.

As noted, in asserting that the RNs are supervisors, the Employer relies on their duties and responsibilities as the “s” nurse, in making rounds with the physician, taking orders from the physician, advising others of the orders, processing admissions and discharges, scheduling appointments, and assessing residents to decide whether to contact a physician. While these duties are certainly indicative of the education, skill and expertise of the RNs, they do not demonstrate the exercise of supervisory authority. As the Board has recognized, “the RNs’ status as professional employees carries with it responsibility for making expert judgments in assessing the conditions and needs of patients.” Bozeman Deaconess Foundation d/b/a Bozeman Deaconess Hospital, 322 NLRB 1107 (1997). Further, none of the duties and responsibilities of the “s” nurse impacts on the terms and conditions of employment of the LPNs or aides.

Further, the record discloses that the RNs spend a substantial part of their workday performing skilled direct patient care. During the course of the workday, the RNs also oversee the work of the LPNs and aides. It is well-established that the oversight of lowered skilled nursing staff in providing routine caretaker services to residents in nursing homes is not supervision within the meaning of the Act. Vencor Hospital, supra, slip op. at 4; Ten Broeck Commons, supra at 811.

Finally, the Employer has relied upon the fact that, at times, the RN is the highest ranking individual on the premises, and as such, is responsible for assessing the conditions of residents and determining if a physician should be contacted, and is responsible for addressing other patient care or employee matters that may arise. Significantly, the Administrator and DON have made their home telephone numbers available and as demonstrated by an instance where

there was short-staffing, have come into the facility outside of their regular work hours to deal with matters requiring immediate attention.

The Board has stated that “the Act does not state or fairly imply that the highest ranking employee on a shift is necessarily a supervisor”. Northcrest Nursing Home, supra at 500. This is particularly true where the undisputed supervisors are available at their homes by telephone, as in the instant case. See also Bozeman Deaconess Hospital, supra. Moreover, there is no evidence of record that at the times when upper management was not present in the facility, that the RNs have ever independently exercised any judgment beyond the professional judgment possessed by virtue of their education and experience.

Based on the above and the record as a whole, I find that the petitioned-for RNs are not supervisors within the meaning of the Act, and accordingly, I shall direct an election in the petitioned-for unit.<sup>18</sup>

Accordingly, I find that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time registered nurses employed by the Employer at its Chicora, Pennsylvania facility, excluding all certified nursing assistants, non-certified nursing assistants, licensed practical nurses, social service aides, activities aides, housekeeping employees, laundry employees, hospitality aides, cooks, dietary aides, maintenance employees, office clerical employees and guards, other professional employees and supervisors as defined in the Act.

---

<sup>18</sup> I note that there has been a split in the Circuit Courts of Appeals regarding the Board’s approach to the charge nurse supervisory issue, with the Third Circuit Court of Appeals denying enforcement in Passavant Retirement and Health Center v. NLRB, 149 F.3d 242 (3<sup>rd</sup> Cir. 1998) and in NLRB v. Attleboro Associates, Ltd., 176 F.3d 154 (3<sup>rd</sup> Cir. 1999). Inasmuch as the Third Circuit has rejected a per se rule, and instead indicated that a determination of supervisory status must rest on the facts of each case, Attleboro Associates, Ltd., id. at fn. 5, it is unclear whether the Third Circuit would find, on the instant record, that the RNs involved herein are supervisors. In any event, I am bound to follow the law as enunciated by the Board, notwithstanding any contrary authority in the Circuit Courts of Appeals.

### **DIRECTION OF ELECTION**

An election by secret ballot will be conducted by the undersigned Regional Director among the employees in the unit set forth above at the time and place set forth in the Notice of Election to be issued subsequently, subject to the Board's Rules and Regulations.<sup>19</sup> Eligible to vote are those employees in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.<sup>20</sup> Those eligible shall vote whether

---

<sup>19</sup> Pursuant to Section 103.20 of the Board's Rules and Regulations, official Notices of Election shall be posted by the Employer in conspicuous places at least 3 full working days prior to 12:01 a.m. of the day of the election. As soon as the election arrangements are finalized, the Employer will be informed when the Notices must be posted in order to comply with the posting requirement. Failure to post the Election Notices as required shall be grounds for setting aside the election whenever proper and timely objections are filed.

<sup>20</sup> In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. Excelsior Underwear, Inc. 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969). Accordingly, it is hereby directed that the election eligibility list, containing the full names and addresses of all eligible voters, must be filed by the Employer with the Regional Director within seven (7) days of the date of this Decision and Direction of Election. The Regional Director shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office, Room 1501, 1000 Liberty Avenue, Pittsburgh, PA 15222, on or before August 31, 1999. No extension of time to file this list may be granted, except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

or not they desire to be represented for collective bargaining by Service Employees  
International Union, Local 585, AFL-CIO.

Dated at Pittsburgh, Pennsylvania, this 24th day of August 1999.

/s/Gerald Kobell

Gerald Kobell  
Regional Director, Region Six

NATIONAL LABOR RELATIONS BOARD  
Room 1501, 1000 Liberty Avenue  
Pittsburgh, PA 15222

177-8580-8050